STRAUB, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the majority in some respects; specifically, in its: (i) denial of the plaintiffs-appellants' ("Plaintiffs") claims for consequential damages; (ii) affirmance of the District Court's findings of correspondence under N.Y. C.P.L.R. 4545; (iii) determination of the proper prejudgment interest to be applied; and (iv) affirmance of the dismissal of certain claims against United Airlines regarding Flight 11.

But for the reasons that follow, I respectfully dissent from the majority's decision limiting Plaintiffs' potential tort recovery as a matter of law. That determination raises complex, important, and novel questions of New York law that are best addressed by certification for decision by the New York Court of Appeals.

In this case, stated basically, Plaintiffs leased public property—buildings in the World Trade Center—in return for rental payments and various other obligations, including, they contend, an assurance to the property's government owner to repair any damage to the property during the leases' term. After the

property was tragically destroyed, Plaintiffs suffered catastrophic economic losses: they assert that not only must they continue to make rental payments on their leases, but they must also pay for the World Trade Center's rebuilding. Plaintiffs sued the defendants-appellants ("Defendants") for compensation for these losses, alleging that Defendants' negligence led to the World Trade Center's destruction.

The majority permits Plaintiffs some recovery—mostly for the reduction in rental value of their leases—but it categorically prohibits Plaintiffs from obtaining compensation from Defendants for the substantial costs of rebuilding the World Trade Center.[1] In so doing, the majority decides two novel questions of New York law that, in my view, should instead be addressed in the first instance by the New York Court of Appeals.

Each of the two questions, if decided in Plaintiffs' favor, could allow some recovery for rebuilding costs. The first novel question of New York law is

[1] Contrary to the majority's suggestion, *see* Maj. Op. at 31, Plaintiffs seek compensation only for the amounts necessary to rebuild the World Trade Center as it was before September 11, 2001, *see* Brief for Plaintiffs at 14, 52 n.36; Reply Brief for Plaintiffs at 13.

whether Plaintiffs can recover for the diminution in value of their leases caused by the leases' obligation to rebuild. The majority excludes consideration of this loss as a matter of law, but New York's highest court might reasonably instead consider it a jury question of proximate cause. The second novel question of New York law is whether Plaintiffs can alternatively recover for their rebuilding costs based on the World Trade Center's public value. Again, the majority rejects this basis for recovery as a matter of law, but where Plaintiffs were obligated to repair damage to state property and have claimed that doing so is merited by the property's public value, New York's highest court could justifiably find that equity warrants compensation from the tortfeasor that caused the property's damage.

New York's courts have not addressed these questions (or anything close to them), and I do not believe that we can confidently predict how the New York Court of Appeals would resolve them. At the least, and as I explain below, I have considerable doubt that New York's highest court would follow the majority's reasoning.

I. Issue One: The Obligation to Rebuild

As the majority explains, damage to property can be remedied either by paying for the property's lost value or by paying for the property's restoration. Maj. Op. at 26. Because either can place the victim in the same position as before the wrong occurred, *see id.*, New York's courts generally award the lesser of the two. This "lesser of two" principle affords full compensation while encouraging mitigation of loss. *See Hartshorn v. Chaddock*, 135 N.Y. 116, 122 (1892); *see also Fisher v. Qualico Contracting Corp.*, 98 N.Y.2d 534, 539 (2002) (stating that the principle provides a plaintiff with "no more than is reasonably necessary to remedy fully the injury while avoiding uneconomical efforts" (internal quotation marks omitted)).

Applying the "lesser of two" rule to this case, the majority reasons that Plaintiffs are entitled to the lesser of the diminution in value of their leases caused by the property's damage and the amount necessary to repair the property. Maj. Op. at 29. The leases' purported obligation to rebuild, however, complicates this analysis. It causes the diminution in value of Plaintiffs' leases

(the first measure of compensation) to be significantly impacted by the cost of restoration (the second measure).

A proper calculation of a lease's value must take into account all of its provisions. *E.g.*, *Irv-Ceil Realty Corp. v. State*, 43 A.D.2d 775, 775–76 (3d Dep't 1973). As the majority itself states, a lease's value is "the amount that a buyer would be willing to pay for the right to assume the lessee's rights *and obligations*." Maj. Op. at 28 (emphasis added). The obligation to rebuild would have obviously discouraged any potential purchaser of Plaintiffs' leases after September 11, 2001. Yet the majority instructs the District Court to ignore it when calculating the leases' diminution in value—in the majority's own words, to award compensatory damages based on a "hypothetical" rather than reality. *See id*. at 47–48, 51 n.15. The majority does not challenge Plaintiffs' assertion that they were actually damaged by the obligation to rebuild. Instead, the majority reasons that Plaintiffs "should not receive a higher measure of damages" simply because they contractually agreed in advance to repair the property in the event of damage. *Id.* at 32.

New York's highest court might easily disagree with the majority's conclusion. The majority's reasoning runs contrary to the basic principle—expressed in the "lesser of two" rule—that tort damages aim to restore the injured plaintiff to the position that would have been occupied had the harm not occurred. *See McDougald v. Garber*, 73 N.Y.2d 246, 253–54 (1989). Although the "lesser of two" rule is one of mitigation, *see Hartshorn*, 135 N.Y. at 122, and thus the majority emphasizes that a plaintiff's post-tort choice to repair property, on its own, does not justify awarding replacement costs in excess of market value, *see* Maj. Op. at 31, that is not this case. Plaintiffs could not have mitigated the reduction in value of their leases caused by the contractual obligation to rebuild. New York has a long history of permitting tort damages based on contractual losses. *E.g.*, *Steitz v. Gifford*, 280 N.Y. 15, 18–22 (1939) (holding defendant responsible for reduced revenue on crop sold by plaintiff farmer after defendant's negligent driving incapacitated plaintiff, causing a delay in crop's sale). And in at least one case, a New York court has allowed a tort victim to seek damages greater than the value of destroyed property based on the terms of a lease agreement. *See Plouffe v. Rogers*, 144 A.D.2d 218, 219–20 (3d Dep't 1988)

(permitting damage claim for early termination charges on an automobile's lease after negligently caused crash). Hence, there is considerable reason to think that the New York Court of Appeals would, rather than preclude consideration of Plaintiffs' obligation to rebuild as a matter of law, instead permit a jury to consider whether the obligation fits within the scope of proximate cause.

II. Issue Two: The World Trade Center's Public Value

Even if Plaintiffs' purported obligation to rebuild were ignored in calculating the diminution in value of their leases—as the majority holds—Plaintiffs might alternatively merit compensation for rebuilding based on the World Trade Center's public value. Plaintiffs, supported by a trio of experts and an amicus brief on behalf of the State of New York, assert that the World Trade Center is worth more to the public (and thus to its government owner) than both what it cost to build and what it would be worth to a potential private purchaser—in other words, that the World Trade Center's public value is greater than both its replacement cost and its market value. Accepting this uncontroverted claim as true—as we must in assessing Defendants' motion for summary judgment—Plaintiffs' rebuilding obligation serves the public interest

and is economically beneficial. The majority nonetheless determines that the New York Court of Appeals would preclude consideration of the World Trade Center's public value in determining Plaintiffs' compensation. I cannot reach the same conclusion with any degree of confidence.

The World Trade Center was built for the public benefit, *see* N.Y. Unconsol. Law §§ 6601(9), 6610; *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 388–89, *appeal dismissed*, 375 U.S. 78 (1963), and the Port Authority retains ownership of the World Trade Center pursuant to the site's authorizing legislation, *see* N.Y. Unconsol. Law § 6603. The decision to lease portions of the World Trade Center to Plaintiffs was intended to "maximiz[e] the value of the World Trade Center to the Port Authority and to the people of the region," Joint App'x at 377 (Mins. of the Port Auth. Bd. of Comm'rs, Apr. 26, 2001), and New York courts have recognized the public purpose of projects involving leases of public property to private parties, *e.g.*, *Murphy v. Erie County*, 28 N.Y.2d 80, 87 (1971).

Although the New York Court of Appeals has not addressed the valuation of tortiously damaged public property, it would be consistent with New York's

basic principles of tort law to consider the World Trade Center's public value in determining the damages a tortfeasor owes for its destruction. As noted above, the purpose of tort recovery under New York law is "to have the wrongdoer make the victim whole." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007). Even though an owner of damaged property can typically be made whole by compensation for the property's diminution in market value, market value may provide inadequate compensation for damage to property built and owned by the government; such property might have a utility to the public—particularly a site-specific utility—that exceeds the property's commercial worth.

Hence, whereas the "lesser of two" rule compares a property's market value to its replacement cost for determining full compensation to an owner of private property, full compensation to a government owner of public property might require consideration of the property's public value—essentially, the "lesser of two" of *public* value and replacement cost. For example, a tree in a public park might cost $5,000 to plant, have a value to the public in its location of $10,000, and yet increase the park's market value by only $300. If the tree were negligently cut down, replanting would not constitute waste, and the

government would be made whole by compensation of $5,000, not $300.[2] This is the calculus that Plaintiffs' experts assert applies to the World Trade Center: that its market value is less than its replacement cost, which, in turn, is less than its value to the public.

These considerations could lead the New York Court of Appeals to conclude that the tortious destruction of property built and owned by the government merits a compensatory award of replacement costs where the property's value to the public exceeds its costs of restoration, regardless of its market value. Indeed, in different contexts, New York courts permit compensation based on replacement cost—in excess of lost market value—where market value provides an inadequate measure of loss. *E.g.*, *Lake v. Dye*, 232 N.Y. 209, 214 (1921) (household goods); *cf. Matter of Rochester Urban Renewal Agency*

[2] A variation of this hypothetical is included in Professor Dobbs's treatise on remedies. *See* 1 Dan B. Dobbs, *Law of Remedies* § 1.9, at 46–47 (2d ed. 1993). In Professor Dobbs's version, the tree is on privately-owned land. Although paying for the tree's replacement "is not inefficient" and "may add to efficiency in providing appropriate deterrence," Professor Dobbs cautions against measuring the defendant's liability by the public's loss where the property is privately owned. *Id*. at 46. "The answer is different," writes Professor Dobbs, "when it comes to public resources" in which the public has a right that may be pursued by the government. *Id.* at 47.

(Patchen Post), 45 N.Y.2d 1, 8–9 (1978) (compensation for government taking of "specialty" property, which might be worth to its owner "everything it cost to construct and more" yet lacks a buyer "willing to purchase it even at its reproduction value").

Under the majority's reasoning, however, Defendants are responsible for much less: simply the reduction in value of Plaintiffs' leases without consideration of the substantial costs of rebuilding. Defendants might conceivably be liable to the World Trade Center's government owner for rebuilding costs, except that the Port Authority can receive assistance with rebuilding from Plaintiffs pursuant to their rebuilding obligation, which "served to protect the extensive public investment in the [World Trade Center]." Brief for Amicus Curiae State of New York ("N.Y. Amicus Br.") at 21. The Port Authority is "not presently seeking damages" from Defendants "so long as" Plaintiffs "continue[] to comply" with their contractual obligations. Joint App'x at 589 (Decl. of Keith E. Harris, Chief of the Commercial Litig. Div. of the Port Authority, Aug. 11, 2008). The result is a windfall for Defendants, as they must

pay for much less than the full scope of damage caused by their alleged tort, while Plaintiffs may be compelled to fund the World Trade Center's rebuilding.

I am not convinced that the New York Court of Appeals would accept this result. It has, for many years, applied equitable principles to permit recovery against a wrongdoer by a party that was "compelled to pay the damages which the wrongdoer should have paid." *Dunn v. Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 217 (1903). The equitable doctrine of subrogation, for instance, in the context of insurance, "entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." *N. Star Reinsurance Corp. v. Cont'l Ins. Co.*, 82 N.Y.2d 281, 294 (1993). The New York Court of Appeals has explained, in reasoning that could easily apply here, that subrogation "allocates responsibility for the loss to the person who in equity and good conscience ought to pay it, in the interest of avoiding absolution of a wrongdoer from liability simply because the insured had the foresight to procure insurance coverage." *Id.*; *see also Teichman by Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 521 (1996) (stating that the "right of subrogation" was "formulated to prevent unjust

enrichment" and "is based upon principles of equity and natural justice" (internal quotation marks omitted)); *Pittsburgh-Westmoreland Coal Co. v. Kerr*, 220 N.Y. 137, 140 (1917) ("The doctrine of subrogation is a device to promote justice."). The New York Court of Appeals has repeatedly emphasized that the equitable principles of subrogation should be applied broadly where warranted. *E.g.*, *3105 Grand Corp. v. City of New York*, 288 N.Y. 178, 182 (1942) (subrogation "is a highly favored remedy" and "courts are inclined to extend rather than restrict its application"); *Ocean Accident & Guarantee Corp. v. Hooker Electrochemical Co.*, 240 N.Y. 37, 47 (1925) (asserting that the "principle of subrogation ought to be liberally applied for the protection of those who are its natural beneficiaries").

The majority asserts that Plaintiffs cannot recover for the public's loss because they did not serve as the public's "trustee," Maj. Op. at 37, but the majority does not address the possibility that Plaintiffs may nonetheless warrant compensation based on a rebuilding obligation that "served to protect" the public's investment. N.Y. Amicus Br. at 21. Instead, the majority cites *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979), to note that the Supreme Court

has, in determining "just compensation" for purposes of the Takings Clause, refused to compensate private plaintiffs for the community value of their properties. *See* Maj. Op. at 37. Yet *564.54 Acres of Land* is hardly instructive in predicting how New York's highest court would resolve the issues presented here. It addressed the power of eminent domain (and thus discussed the constitutional limits of "just compensation," not what a tortfeasor ought to pay), it has not once been cited by a published decision of New York's courts, and, unlike here, it involved a private entity that was "under no legal or factual obligation to replace" the taken property or compensate the public for its reconstruction, 441 U.S. at 515. Contrary to the majority's point, moreover, the New York Court of Appeals has explicitly considered public value in determining just compensation for a government taking of private property. *See Matter of Port Auth. Trans-Hudson Corp. (Hudson Rapid Tubes Corp.)*, 20 N.Y.2d 457, 465, 468–70 (1967) (holding that private owner of rail lines and tunnels taken by Port Authority was entitled to more than property's market value, which was scrap, because property formed "an essential part of an essential public facility"), *cert. denied*, 390 U.S. 1002 (1968).

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New York's courts have not addressed the issues discussed above, and I do not believe that we can confidently predict how the New York Court of Appeals would resolve them. The issues are complex, their resolution requires significant public policy choices, and their import to New York State is evident—significant enough, in fact, to warrant the submission of an unsolicited amicus brief on its behalf in this case. Leases frequently include an obligation to rebuild, and New York's amicus brief explains that "[m]any public projects are implemented through long-term leases to private parties." N.Y. Amicus Br. at 3. The State emphasizes its "strong interest in avoiding misclassification of public property as merely private in nature, and in preventing the mistaken construction of New York law to provide an incentive for private parties to abandon their contractual rebuilding and restoration obligations to public entities." *Id.* at 35.

Certification can delay resolution of a specific case, but as the Supreme Court has noted, "[i]t does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v.*

Schein, 416 U.S. 386, 391 (1974). Deciding an undetermined question of state law rather than certifying the question to the state's highest court impedes the development of state law and exposes litigants to the risk that our conjectures on state law are wrong. *E.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 318 (1991) (rejecting our holding on an open question of New York law after we declined to certify). The New York Court of Appeals has underscored "the great value in New York's certification procedure" and affirmed that certification "facilitat[es] the orderly development and fair application of the law and prevent[s] the need for speculation." *Tunick v. Safir*, 94 N.Y.2d 709, 711–12 (2000). The New York Court of Appeals might decline to answer our certified questions, although it does so rarely. *See id.* at 712. But by declining to certify at all, we deny it the opportunity to resolve, in the first instance, novel questions of state law rife with public policy implications.

The State of New York's amicus brief in this case explicitly requests, in the alternative, that we certify this case to the New York Court of Appeals. N.Y. Amicus Br. at 36 n.11. I would grant that request, as I find that the issues of New York law raised here are best addressed by certification. *See* N.Y. Comp. Codes

R. & Regs. tit. 22, § 500.27(a); 2d Cir. Local R. 27.2; *see also In re Santiago-Monteverde*, 747 F.3d 153, 158 (2d Cir. 2014) (stating general requirements for certification).